15

FILED

OCT 19 1945

CHARLES ELMORE CROPLEY
CLERK

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 539

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,

vs.

SECOND NATIONAL BANK AND TRUST COMPANY
of Saginaw, Michigan, individually and as Trustee
under the Ninth and Tenth Paragraphs of the Will
of Arthur D. Eddy, Deceased,
Respondent and Plaintiff Below

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

WILLIAM ALFRED LICKING,
Attorney for Petitioner,
1607 Ford Building,
Detroit 26, Michigan.

Johnston Reid & Ruland Co., Law Bldg., 607 East Fort St., W., Detroit 26, Mich.

SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1-12
Questions of Public Interest	2
Summary Outline of Facts	2-8
Reasons Relied on for Allowance of Writ	8-12
Brief in Support of Petition for Writ of Certiorari	13-39
I. Opinion of Sixth Circuit Court of Appeals	13
II. Jurisdiction	14
III. Specification of Errors	14
IV. Brief Statement of Facts and Issues	14-21
V. Argument on law	22-34
Point I. "Costs" do not include Counsel fees in a fraud action	22-23
Point II. The Mandates of the Court of Appeals Expressly Limit Counsel Fees on Appeal to the Usual $20 Taxable Fee	23-25
Point III. The Trustee commenced this litigation—and the burden of proof to justify admitted losses was always upon it, under the Michigan Rule of Davidson v. Young, 290 Mich. 266	25
Point IV. The Trustee's Accounting judgment of February 7, 1939 was not res adjudicata	26
Point V. The District Court's Findings on counsel and auditors' fees	26-28
Point VI. Opinion of Circuit Court of Appeals	28-33
Point VII. Conclusion of Brief	33-34

Page

Certificate of Counsel..... 34

Appendix A 35-39

TABLE OF CASES

American Trust Co. v. Speers, 60 Fed. (2d) 994, 997 28

Davidson v. Young, 290 Mich. 266.....4, 18, 29, 31, 36

Flanders v. Tweed, 15 Wall. 450..... 23

Grant v. Fletcher, 283 Fed. 243 Syl. 21 and 22..... 10, 22

Kansas R. R. Co. v. Trust Co., 281 U. S. 1, Syl. 1 and 8.....6, 8, 9, 23

Missouri Ry. Co. v. Larabee, 234 U. S. 459, 468.... 7, 9

Oelrichs v. Spain, 15 Wall. 211..... 23

Simmons Co. v. Grier Co., 258 U. S. 82, 89..... 26, 28

Sprague v. Ticonic Bank, 307 U. S. 161..... 23, 24

Title 28 U.S.C.A. Sec. 344..... 14

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No..... .....

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,
vs.
SECOND NATIONAL BANK AND TRUST COMPANY
of Saginaw, Michigan, individually and as Trustee
under the Ninth and Tenth Paragraphs of the Will
of Arthur D. Eddy, Deceased,
Respondent and Plaintiff Below

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To: The Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

QUESTIONS OF PUBLIC INTEREST

(a) Has the District Court power to award extraordinary counsel fees ($5000) against Petitioner Cleveland —for two briefs filed by Respondent Trustee opposing applications for Writs of Certiorari?

(b) Has the District Court power to award extraordinary counsel fees ($10,000) against Petitioner Cleveland—for briefs (and oral arguments) filed by Respondent Trustee, as appellee, on two appeals in the Circuit Court of Appeals—

when in each appeal the Mandate of the Appellate Court only allowed to Respondent Trustee a counsel fee of $20?

(c) Are such counsel fees on appeal of $15,000 punitive and unreasonable?

(d) Are such counsel fees on appeal against public policy—as, in effect, fines imposed to prevent or discourage any appeals or reviews of District Court judgments—which defeated parties believe in good faith they should take to this Supreme Court?

SUMMARY OUTLINE OF FACTS

I. District Court Judgment of December 13, 1938.

Awarded to Respondent Trustee its "costs" to be taxed. Affirmed on appeal (117 Fed. (2d) 938). Court of Appeals' Mandate allowed Respondent Trustee $20 as counsel fee.

II. District Court Judgment of February 7, 1939.

Awarded "Disbursements" and "Accounts of its Auditors and counsel" to be filed and approved—

and expressly provided that no other counsel fees shall be taxed "by plaintiff" Trustee Respondent (R. 258).

Affirmed on appeal (117 Fed. (2d) 1009) Court of Appeals' Mandate allowed Respondent Trustee $20 as counsel fee.

III. District Court Judgment of November 30, 1943.

Awarded Respondent Trustee $39,000 of counsel fees—as follows:

(a) $12,000 under the District Court judgment of December 13, 1938, awarding Trustee taxable "costs."

(b) $12,000 under the District Court judgment of February 7, 1939—awarding Trustee only its expenses to date of that judgment—

and expressly forbidding any other or additional counsel fee allowance against Petitioner and in favor of Trustee (R. 258).

(c) $10,000 on appeal ($5000 in each case) although the affirmance Mandates only allowed Respondent Trustee $20 as counsel fees in each case.

(d) $5000 to Respondent Trustee for briefs in this Supreme Court—opposing the two applications for certiorari.

IV. Testamentary Accounting Judgment of February 7, 1939.

(a) Respondent Trustee Bank, as Testamentary Trustee, sued petitioner Cleveland, a one-sixth residuary legatee, asking exoneration for admitted losses of $125,000 in petitioner's legacy.

(b) Petitioner Cleveland, as a defendant, asked Trustee to justify the admitted losses—only on corporate stock losses in years of 1925 to 1930—and waived the admitted losses on bonds, lands and accounts receivable.

(c) This justification petitioner was entitled to under the Michigan Law, See

Davidson v. Young, 290 Mich. 266.

(d) The District Court, Hon. Arthur J. Tuttle presiding, held by judgment of February 7, 1939 that petitioner Cleveland had sustained no losses chargeable to respondent Trustee Bank.

This judgment was affirmed on February 14, 1941 (117 Fed. (2d) 1009) without opinion by the Sixth Circuit Court of Appeals.

(e) The judgment of February 7, 1939, allowed Trustee Bank to file

> "a report of its disbursements in the above matter * * * and upon approval thereof by this (District) Court * * * that the same be paid * * *" (R. 256, 258).

(f) Upon affirmance of this District Court Judgment of February 7, 1939, by the Court of Appeals (117 Fed. (2d) 1009) a mandate was issued allowing respondent Trustee

a counsel fee of $20, as allowed by the Rules of the Appellate Court of Appeals.

(g) Now, the Counsel Fee Judgment of the District Court of November 30, 1943 (here appealed from) actually allowed Trustee's counsel fees at $19,500 as follows:

(1) $12,000 for services in the District Court—in a suit brought by Trustee—admitting heavy losses in petitioner's one-sixth residuary interest—and

(2) $5000.00 on appeal in the Court of Appeals—for writing Trustee's briefs for that appellate court --notwithstanding the Court of Appeals' mandate had only allowed Trustee the usual $20 by rule counsel fee—and

(3) $2500.00 on the petitioner's application for writ of certiorari in this Supreme Court, which was denied.

V. Petitioner Cleveland's Mother's Fraud Action Judgment of December 13, 1938.

(a) Trustee Bank had made petitioner Cleveland's Mother a party defendant in its Testamentary Trustee's accounting suit resulting in the above mentioned judgment of February 7, 1939—since the Mother was a life tenant.

(b) The Mother's Administrator, Howell Van Auken, discovered that Trustee's Testator, Arthur D. Eddy had grossly defrauded the mother in her life time (Mr. Eddy was her brother) out of about $750,000. The Administrator filed an answer and cross-bill for damages for the fraud, against the Trustee.

(c) Petitioner Cleveland was not interested in the administrator's claim—and took nothing of any recovery.

(d) District Judge Tuttle dismissed the Administrator's fraud action (see 117 Fed. (2d) 938) and for some reason of his own determined to punish the mother's daughter, petitioner Cleveland, by doubling the foregoing assessments of Trustee's counsel fees against petitioner Cleveland, and actually by the judgment of November 30, 1943 (now appealed from) allowed the respondent Trustee—out of petitioner Cleveland's one-sixth residuary legacy—the following additional sums, namely:

(1) $12,000 for Trustee's counsel fees in the District Court on the Doebler (mother) Administrator's fraud action, and

(2) $5000 on appeal of the mother's administrator in the Court of Appeals — notwithstanding that Court's mandate of affirmance only allowed Trustee Bank the usual counsel fee of $20.00 (which is controlling—See 281 U. S. 1. Syl. 8).

(3) $2500 on the administrator's application for certiorari in the Supreme Court of the United States—for Trustee's brief in opposition to the writ.

This Doebler Administrator's claim for damages against the Arthur Eddy Estate was overruled by the District Court of Appeal's judgment of December 13, 1938, affirmed without opinion by the Court of Appeals on February 14, 1941, in cause No. 8336, 117 Fed. (2d) 938.

This separate judgment allowed the Trustee Plantiff Bank "costs." R. 100, First Appeal case.

It is the law of the United States Courts that "costs" in a Lower Court Judgment do not include or justify allowances for extraordinary counsel fees,—see

Kansas R. R. v. Trust Company, 281 U. S. 1, Syl. 4.

Notwithstanding this Rule and the further rule that extraordinary counsel fees are not allowed on appeal in the Federal Courts of Appeal or this Supreme Court of the United States—

See *Missouri Ry. Co. v. Larabee,* 234 U. S. 459, 468.

(1) A total of $10,000 of counsel fees was allowed for preparation of Trustee's briefs in the Sixth Circuit Court of Appeals—and

(2) A total of $5000 for Trustee's two briefs opposing certiorari in this Supreme Court—all of which $15,000 was assessed against petitioner Cleveland by the District Court Judgment of November 30, 1943, here sought to be reviewed by application for writ of certiorari.

VI. Conclusion of Summary Outline—

The District Court's Judgment of February 7, 1939, (Cause No. 8366) did allow Trustee Bank—in the testamentary Trustee's accounting action—to file

> "a report of its disbursements in the above matter * * * and upon approval thereof by this Court * * * that the same be paid * * *" (R. 256, 258).

This judgment of February 7, 1939, was affirmed without opinion by the Court of Appeals on February 14, 1941 (117 Fed. (2d) 1009)—ten days after it was argued and submitted—and on the very expiration date of ten days allowed appellant Cleveland to file supplemental brief.

This District Court Judgment of February 7, 1939, did not purport or pretend to include extraordinary counsel fees on appeal against appellant Cleveland, to "persuade" her not to appeal to the Court of Appeals.

Had the District Court's Judgment of February 7, 1939 warned petitioner and appellant Cleveland that she would be, in effect, fined—by the District Judge—a total of $15,000 to pay for the writing of appellee Trustee's briefs on the two appeals to the Court of Appeals and in this Supreme Court on certiorari applications—

she could at least have asked permission to appeal (by preliminary motion to the Court of Appeals) and thus possibly have avoided incurring any such unheard of liability.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. A Judgment for "Costs" in a fraud action (party against party) does not permit the District Court to tax extraordinary attorneys fees.

Kansas R. R. v. Trust Company, 281 U. S. 1, Syl. 4.

II. The District Court—after affirmance by the Circuit Court of Appeals—

which by its Mandates allowed the Appellee Bank Trustee, in each of two cases, the usual taxable attorney's fee of $20.00—

cannot thereafter tax against the Appellant, the Trustee Appellee's claimed counsel fees of $10,000, for preparing briefs and arguing the two causes on appeal in the Court of Appeals.

III. The District Court could not alter or vary the mandates of the Appellate Court allowing counsel fees of $20 on each appeal.

See *Kansas R. R. v. Trust Company, supra,* Syl. 8.

IV. The District Court, after affirmance in the Circuit Court of Appeals, has no power to allow the Appellee Trustee counsel fees in this Supreme Court of the United States—

of $5000 for preparing briefs in opposition to the Doebler Administrator's and the petitioner Cleveland's applications for writs of certiorari—which were denied—

Missouri Pac. Ry. Co. v. Larabee, 234 U. S. 459, 468.

V. A judgment for "costs" against a residuary remainderman (not an heir of the testator) cannot be made the basis for assessing a Testamentary Trustee's attorneys fees incurred in defending an heir's (Doebler) administrator's equity suit for claimed fraud committed by the testator in his lifetime.

In other words—a defendant remainderman (not an heir) whose one-sixth share of the residue under the will would have been decreased if the heir's (mother) suit for fraud was sustained—was held liable by the District Court's counsel fee judgment of November 30, 1943, here appealed from—

for all the testamentary trustee's counsel fees expended in defending the suit for fraud brought by the mother's administrator—

and although the efforts of the Trustee benefited not only petitioner Cleveland's one-sixth interest in the estate,

but also two other legatees' (the Charitable Trust and the testator's widow) five-sixths interests in the estate.

VI. Petitioner Cleveland was not properly liable for all the Trustee's counsel fees in the fraud action—for

(a) she did not prosecute the fraud suit, (b) a recovery would not have benefited her but would have reduced her legacy, and (c) the fraud suit was strictly a party against party action, and is not one where counsel fees could be allowed to either party as was so held in

Grant v. Fletcher, 283 Fed. 243, Syl. 21 and 22—

Opinion by Hon. Arthur J. Tuttle, District Judge who entered the judgment of November 30, 1943, here appealed from.

VII. The Judgment of February 7, 1939, of the District Court (upon a Testamentary Trustee's bill to justify losses in the Trust corpus) which provided that the Appellee (Respondent here) Trustee

> "file with this Court a report of its disbursements in the above matter, together with statement of accounts of its auditors and counsel, and upon approval thereof by this Court * * *"

was not a *final judgment*, until the amount of the fees had been fixed by the District Court—after affirmance on appeal.

The allowance of counsel fees in the judgment of February 7, 1939, *was interlocutory and not a final judgment* —and until the amount of the fees had been approved by the judgment of November 30, 1943 (here appealed from) all questions of *whether* any counsel fees at all should be allowed, and if so—*how much* were all open to full review by the Circuit Court of Appeals on this appeal from the

fee judgment of November 30, 1943, here sought to be reviewed by application for writ of certiorari.

VIII. The District Court Judgment of November 30, 1943, affirmed May 22, 1945, rehearing denied July 23, 1945, was excessive and unreasonable and the allowances of Trustee's claimed counsel fees exceeded the fair, reasonable value and worth of the services and work rendered and performed, by the following amounts, namely:

(a) In the District Court by at least the sum of $14,000,

(b) In the Circuit Court of Appeals by at least the sum of $7500,

(c) And in this Supreme Court by at least the sum of $3500.

Wherefore, Your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the case numbered and entitled on its Docket,

No. 9802

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,
vs.
SECOND NATIONAL BANK AND TRUST COMPANY, of Saginaw, Michigan, individually, and as Trustee under the Ninth and Tenth Paragraphs of the Will of Arthur D. Eddy, Deceased,
Respondent and Plaintiff Below

to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United

States; and that the Judgment of May 22nd, 1945—rehearing denied without opinion July 23, 1945, therein of said United States Circuit Court of Appeals for the Sixth Circuit be reviewed by this Court and for such other and further relief as this Court may deem proper.

WILLIAM ALFRED LUCKING,
Attorney for Petitioner for Writ of Certiorari.

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No.....

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,
vs.
SECOND NATIONAL BANK AND TRUST COMPANY
of Saginaw, Michigan, individually and as Trustee
under the Ninth and Tenth Paragraphs of the Will
of Arthur D. Eddy, Deceased,
Respondent and Plaintiff Below

BRIEF FOR PETITIONER, CYNTHIA MILLS CLEVELAND, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS

The opinion was filed May 22, 1945, and is found reported in 149 Fed. (2d) 466.

II.

JURISDICTION

The date of the Judgment to be reviewed is July 23, 1945, when petition for rehearing of the judgment of May 22, 1945, was denied.

Appellate jurisdiction is based upon Section 344 of Title 28 of U. S. C. A. and the Constitution of the United States.

III.

SPECIFICATION OF ERRORS

The errors in the opinion and judgment of the District Court entered on November 30, 1943 and of the Sixth Circuit Court of Appeals entered May 22, 1945 rehearing denied July 23, 1945, which are relied upon by Petitioner, are set out in the statement of "Reasons Relied Upon for Allowance of Writ" in the accompanying petition for Writ of Certiorari.

Petitioner relies upon and will urge before this Court, all of the errors therein assigned.

IV.

BRIEF STATEMENT OF FACTS AND ISSUES

A. Summary of Counsel Fee Judgment of November 30, 1943—

This Judgment required Petitioner (one-sixth remainderman Cleveland) to pay all the Respondent Trustee's

counsel fees of $40,000 (except $1000) incurred upon *three distinct issues,* and decided by two separate judgments, as follows:

FIRST: In a fraud claim (first case judgment, entered December 13, 1938) brought by the ancillary Administrator of petitioner's mother, Lila Eddy Doebler, against the Respondent Trustee—in which fraud claim (denied by the Court) Petitioner Cleveland had no interest in or right to any part of any possible recovery.

On the contrary, such a recovery would have reduced petitioner's one-sixth of the residuary legacy—as well as the Charitable Trust's one-half of the residue—and testator's widow's one-third share. They all benefited two and three times more—by the Judgment (over-ruling the claim of fraud) than did Petitioner, *who* upon no theory should have been required to pay more than one-sixth of any counsel fees allowed to the Respondent Trustee, for defending the Estate against the fraud claim.

SECOND: In the life tenant's (Doebler) unpaid income accounting claim of $181,000, by her ancillary administrator, against the Respondent Trustee (second case judgment, entered February 7, 1939) any recovery of which would have decreased petitioner Cleveland's one-sixth of residue, as well as the charitable trust's and the testator's widow's residuary interest.

No part of any recovery of this admitted unpaid income would have belonged to Petitioner Cleveland.

THIRD: In Petitioner Cleveland's claim (also covered by the second judgment of February 7, 1939) for losses in her one-sixth share of the trust corpus, a recovery was denied on the ground no losses did actually occur, not-

withstanding Trustee's amended accounting bill admitted it had lost over $125,000 belonging to Petitioner's one-sixth share of the residue in the thirteen year life estate period ending in 1938.

B. Proceedings Before Final Hearings.

(a) Trustee's Amended Bill.

The Respondent Testamentary Trustee, in 1935 filed its amended accounting complaint, admitting over $800,000 lost in a net estate appraised at $3,767,000 at testator's death in 1925. The assets consisted of corporate stocks and bonds, accounts receivable and real estate, in Saginaw, Michigan, in all of which large losses were admitted. The defendants were:

(1) a life tenant of one-third of the residuary estate, testator's sister (Doebler) and

(2) a residuary legatee of one-sixth of the residuary estate, testator's niece (Cleveland) and her two minor children.

but—the residuary legatees of five-sixths of the estate, the Charitable Trust and Testator's widow, were not made parties to the Trustee's amended bill of complaint filed in March, 1935.

(b) Defendants' Answers.

Defendant Life Tenant Doebler died in May, 1938, thus ending a thirteen year life estate. Her Administrator answered, claiming large unpaid income accruals.

Her Administrator also claimed by cross complaint that testator Eddy had defrauded his sister Doebler in 1920, out of several hundred thousand dollars, by false state-

ments of value of her interests then purchased by her brother, the Testator.

Thus—although neither of the two claims of fraud or unpaid life estate income belonged to the petitioner Cleveland (since they belonged to her Mother's estate in which she took nothing) nevertheless the petitioner's one-sixth residuary interest in the Estate was ordered to pay all the Respondent Trustee's counsel fees of $39,000 on all the three issues and in all three Courts.

Defendant and Petitioner Cleveland also answered and demanded, as a one-sixth residuary legatee, that Respondent Trustee justify and exonerate admitted losses of $125,000 in her one-sixth remainderman's interest during the thirteen year life estate period.

(c) In September, 1936, the Trustee filed its accounting prepared by certified public accountants of Baltimore, Maryland, Messrs. Wooden and Benson.

This audit (Exhibits 3, 4 and 5) covered the years of April 1925 to June 30, 1938—and showed:

(1) $181,000 due life tenant Doebler (petitioner's mother);

(2) $181,000 due the Charitable Trust—

(3) Losses of $750,000 in the corpus of the estate of which Petitioner's one-sixth of the residue thus lost $125,000—which included

losses of $540,000 in the Corporate Stock account, of which Petitioner's loss was one-sixth.

(d) Petitioner Cleveland filed exceptions to *only one loss*—that is, in the corporate stock account—*and no exceptions were filed* to the Trustee's admitted losses in the

corporate bonds, real estate and accounts receivable, totalling about $200,000, of which her loss was also one-sixth.

(e) Thus—*the only issue* between Petitioner Cleveland and the Respondent Trustee was whether it had negligently speculated in the corporate stocks of various corporations—the principal losses in which were in local Saginaw corporations doing a banking business with the Trustee Bank.

(f) Under Michigan Law (*Davidson v. Young,* 290 Mich. 266) the Trustee, therefore, was required to justify these admitted stock losses—and the burden of proof was upon it—and Petitioner Cleveland had full right of cross examination of the Trustee's witnesses.

(g) On the Hearing of Trustee's Petitions for Counsel fees resulting in the judgment of November 30, 1943, the Trustee's Counsel could not point out any excessive or unnecessary cross examination by her counsel.

The District Court made no finding whatever that any part of the expense of the final hearing was increased unnecessarily by the defendant (petitioner) Cleveland's inquiries into these admitted heavy losses in the corporate stocks forming the large part of the corpus losses suffered in the years of 1925 to 1938.

C. Issues Tried and Parties Involved—

Judgment of December 13, 1938—Fraud Case.

The District Court entered Findings and Judgment of no fraud, based almost entirely on some old 1919 letters between the testator and his sister, Mrs. Doebler—

which the Administrator's counsel did not know about—and inspection of which prior to taking of proofs by depo-

sition on the fraud claim—and full preparation—was refused by the District Court to the Administrator.

This judgment of December 13, 1938—denying relief to Mrs. Doehler's Administrator on the Fraud Claim—

merely awarded "costs" to the Respondent Trustee to be taxed (Record First Appeal p. 100).

Therefore—the Fraud issue was the sole controversy involved in this First Judgment of December 13, 1938, and was between the administrator of Petitioner's mother and the Trustee—who was defending the residuary estate belonging (1) one-half to the charitable trust—not ever a party in the case at all—(2) one-third to testator's widow and (3) one-sixth to petitioner Cleveland, Testator's niece.

Judgment of February 7, 1939—Unpaid Income and Corpus Loss Case.

On these Issues the District Court entered Findings and Judgment as follows:

(1) Income issue—

That no unpaid Income was due Mrs. Doebler's administrator—as a matter of law—

although the Trustee's audits admitted $181,000 of net income had accrued in thirteen years of life estate—which had not been declared as dividends by the small family holding company—but under the accounting order of the District Court of April 11, 1936, the auditors had been directed to disregard the corporate entity entirely—and figure net income, regardless of the dividends declared by the Board of Directors.

(2) Mismanagement Issue—

That no losses had occurred in the corpus of Petitioner's one-sixth residuary trust interest—and if losses had occurred the Trustee had not been negligent although the accountings and audits of the Respondent Trustee made under the order of April, 1936, showed $540,000 of losses in corporate stocks alone—during the life estate period of thirteen years.

Parties on the Income Issue—the testator's sister's administrator was the plaintiff and the Trustee the defendant.

The Trustee thus defended the interests of the three residuary legatees—one-half belonging to the Charitable Trust, one-third to the testator's widow and one-sixth to petitioner Cleveland.

Petitioner Cleveland had filed exceptions on November 14, 1936 (R. 123), Numbers 13 to 19 against the Doebler (mother's) claims of unpaid income.

She, therefore, defended (with the Trustee) the interests of the Charitable Trust and of the Testator's widow—

but the Judgment of November 30, 1943 (here appealed from) ordered petitioner Cleveland's one-sixth residuary interest to pay the entire Trustee's counsel fee bill of $39,000—and its auditor's expenses of over $5,000.

D. Forms of Two Judgments of December 13, 1938 and February 7, 1939.

(a) The Fraud Judgment of December 13, 1938, provided:

> "• • • that costs will be awarded at the completion of the entire case by the court, and taxation

thereof be reserved until that time; that the remaining issues raised by the other pleadings in the above entitled cause stand for trial in accordance with the rules of this Court." (First Case Record, p. 100.)

(b) The Income and Corpus Mismanagement Losses Trustee's Accounting Judgment of February 7, 1939, directed the Trustee to—

"• • • file with this Court a report of its disbursements in the above matter, together with statement of accounts of its auditors and counsel, and upon approval thereof by this Court, and prior to the turning over of any assets, that the same be paid out of the dividends due on the shares of stock eventually to be turned over to Cynthia Mills Cleveland • • •

10. No counsel fees shall be taxed by plaintiff except as herein provided for in this decree to be reported by said trustee and allowed by the Court under paragraph 8 hereof. • • •" (R. 258.)

V.

ARGUMENT ON LAW

POINT I

"COSTS" DO NOT INCLUDE COUNSEL FEES IN A FRAUD ACTION

The *fraud case judgment* of December 13, 1938, dismissed the Doebler Administrator's fraud complaint, and provided:

> "that costs will be awarded at the completion of the entire case by the Court, and taxation thereof be reserved until that time. * * *"

After affirmance, such judgment *cannot* be made the basis in the District Court—

for assessing Petitioner Cleveland the Respondent Trustee's claimed Attorneys' fees, in defending the entire Trust Estate against the Doebler (mother) Administrator's fraud claims.

The Fraud action by the mother's administrator against the family holding corporation, C. K. Eddy and Sons, and the Testamentary Trustee—resulting in the judgment of December 13, 1938, was strictly a party against party action —and no extraordinary counsel fees are ever allowed against the defeated party plaintiff. Only the usual statutory attorneys fees can be taxed as "costs."

> *Grant v. Fletcher*, 283 Fed. 243; Opinion by Hon. Arthur J. Tuttle, District Judge (who entered the counsel fee judgment of November 30, 1943, here appealed from)—

And see—

Oelrichs v. Spain, 15 Wall. 211;
Flanders v. Tweed, 15 Wal. 450.

Counsel Fees in the Fraud Action.

No extraordinary counsel fees in a party against party fraud action being allowable—obviously no power existed in the District Court to allow as "costs" extraordinary counsel fees in this fraud action.

This is the rule whether the allowance is for services in the District Court or for services in the Court of Appeals or the Supreme Court.

No part of any of this fraud action recovery would have belonged to Petitioner Cleveland under her mother's will —

since the residue went to Mrs. Doebler's grandchildren —and then only if they survived their mother. R. 128, First Fraud Case judgment of December 13, 1938.

POINT II

THE MANDATES OF THE COURT OF APPEALS EXPRESSLY LIMIT COUNSEL FEES ON APPEAL TO THE USUAL $20 TAXABLE FEE

That this is the rule of the Federal Courts is decided by such cases as

Kansas R. R. v. Trust Co., 281 U. S. 1;
Sprague v. Ticonic Bank, 307 U. S. 161.

In *Kansas R. R. v. Trust Co., supra,* this Court held that a decree allowing "costs" to be taxed does not

include counsel fees—and that the purpose to include attorneys fees must be clearly expressed in the decree or judgment.

So held as to words—

> "to leave the taxation of costs to the court below under the principles, rules and practice in equity."

See bottom first column, page 7 of 281 U. S.

In *Sprague v. Ticonic Bank* (307 U. S. 161), *supra,* the efforts of one plaintiff to establish his rights under a deed of trust—also established the rights of other parties similarly situated.

It was held—

(1) That Plaintiff to recover an allowance of attorneys fees from the *other trusts, cestui que trusts,*—did not have to sue as for a class—

and the allowance could be made after the term of Court.

(2) *Very Important* was this Supreme Court's opinion that *no counsel fees* could be allowed—if the Mandate of the Appellate Court did not provide for such fees—citing *Kansas R. R. v. Trust Company, supra,* on page 168 of the opinion in 307 United States.

This Court held the question of "costs as between solicitor and client" (see page 169) *had not been passed upon* by any Court at all—in the Sprague Case —but that had the Mandate in the Ticonic Case, as in the Kansas Trust Case in 281 U. S. 1, merely allowed "costs" then that was the end of the claim for extraordinary counsel fees.

(3) Thus—in the case at bar—

(a) The fraud judgment of December 13, 1938 only allowed "costs" to be taxed—therefore, under *Kansas R. R. v. Trust Company, supra,* no extraordinary counsel fees are to be allowed in either the District Court or the Appellate Courts.

(b) Also the Court of Appeals' Mandate only allowed $20 counsel fees in that Court.

(c) Also the fraud action (judgment of Dec. 13, 1938) was a strict party against party case—as in *Grant v. Fletcher* (in 283 Fed. opinion by Judge Tuttle) so no counsel fees in any Court were allowable upon any theory—for it was not a case involving recovery of a fund brought into Court—as in the *Ticonic* case, *supra.*

POINT III

THE TRUSTEE COMMENCED THIS LITIGATION—AND THE BURDEN OF PROOF TO JUSTIFY ADMITTED LOSSES WAS ALWAYS UPON IT, UNDER THE MICHIGAN RULE OF DAVIDSON v. YOUNG, 290 MICH. 266

The Respondent Trustee's amended bill filed against Petitioner Cleveland, a residuary legatee (one-sixth interest) admitted it had lost $125,000 of her legacy.

The Michigan Rule is that under such circumstances—the Burden of Proof rests upon the Trustee to justify its admitted losses of trust estate corpus.

POINT IV

THE TRUSTEE'S ACCOUNTING JUDGMENT OF FEBRUARY 7, 1939 WAS NOT RES ADJUDICATA

The Judgment of February 7, 1939, requiring the Plaintiff to file with this Court a "* * * report of its disbursements in the above matter * * * and upon approval thereof by this Court * * *" was not *res adjudicata,* either

(1) of amount of counsel fees and auditors expenses—or

(2) of appellant Cleveland's obligation to pay the same—or any part of them.

Simmons Co. v. Grier Co., 258 U. S. 82, 89.

POINT V

THE DISTRICT COURT'S FINDINGS ON COUNSEL AND AUDITOR'S FEES

District Judge Tuttle made oral findings (R. 178) summarized, as follows:

(a) The Trustee's Counsel had no per diem agreement with the Trustee for their legal services (R. 180)

Therefore, that in fixing a reasonable value of such legal services, the Court must consider "the amount involved, the good results obtained, and the high grade of the lawyers doing the work, which are all elements to be taken into account" (R. 181).

That the $39,000 of fees charged "are reasonable and fair and just" (R. 181).

(b) That since the judgment of February 7, 1939 was affirmed—it was "res adjudicata" that appellant Cleveland must pay all the Trustee's entire counsel fees (R. 182).

The District Court said orally:

> "Now it is my understanding in that regard, in the first instance, that that was decided by this Court at the original hearing from which an appeal has been taken and on review was affirmed and certiorari denied. It is my understanding, that it is fully settled and *res adjudicata*, decided, and not open to review by this Court." (R. 182.)

Counsel Fee and Auditor's Expense Judgment of November 30, 1943.

Thereupon, the District Court entered Judgment against Petitioner Cleveland for $47,113.14 (R. 48-193)—consisting of—

(1) $39,000 Counsel fees

(2) $5,313.03 Auditor's fees and expenses

(3) $1,100 Counsel's expenses

(4) $780 Expert witness fees and photographs as Exhibits

(5) $600.00 Briefs and Transcripts.

The District Court at the conclusion of the two day hearing resulting in the counsel fee judgment of November 30, 1943, here appealed from (R. 48)—

found as a fact that petitioner Cleveland had started all this litigation involving three separate and distinct issues —and, therefore, should pay the entire counsel fee and auditors bills of the plaintiff Trustee.

No issue was framed and no evidence whatever appears in the entire record to support in the smallest degree this Conclusion.

On the contrary—the entire Record shows that the ancillary administrator of Petitioner's mother (Mrs. Doebler) owned and controlled the fraud and income claims—and was the only party who could have benefited by any recovery.

Under such circumstances, the judgment of November 30, 1943, against petitioner Cleveland is wholly unjustified—since the trust corpus case judgment of February 7, 1939 (made the basis of this November 30, 1943 judgment) was not a final judgment—see *Simmons Company v. Grier Company,* 258 U. S. 82, 89.

That the District Court has no power to allow counsel fees in the Court of Appeals is clearly shown by the opinion of District Judge W. Calvin Chestnut in *American Trust Company v. Speers,* 60 Fed. (2d) 994, 997.

POINT VI

OPINION OF CIRCUIT COURT OF APPEALS

The Court of Appeals reasons for affirmance of the District Court's counsel fee judgment of November 30, 1943, against Petitioner—are reported in 149 F. (2d) 466, and may be summarized as follows:

(a) That petitioner Cleveland, a defendant in the Respondent Trustee's amended Testamentary accounting complaint (admitted losses in petitioner's one-sixth residuary remainderman's interest of $125,000) had harassed Trustee by complaining of these losses—which were to have been expected, as the Court of Appeals reasoned, to occur during the depression of 1930 to 1933, etc.

The *fault* with this Conclusion of the Lower Appellate Circuit Court of Appeals is that the only losses Petitioner Cleveland asked justification of (see *Davidson v. Young*, 290 Mich. 266)—

were in speculative local corporate stocks, during the years following testator's death in April, 1925—in which period the Respondent Trustee had ample time to have disposed of the doubtful shares—without a loss.

Petitioner asks permission to fully advise this Court on this point of the Court of Appeals' opinion—since it may be of some importance.

Thus—the Court of Appeals in its opinion stated:

> "The charges of mismanagement and fraud were not in any substantial respect supported. Their only basis was lack of clairvoyance on the part of the trustee in sensing an impending world-wide economic crises, a prescience denied to the foremost industrialists and financiers of the period."

In this assumption, the Court of Appeals was in manifest error for petitioner Cleveland, a one-sixth residuary legatee—made no such claim and took no such position in any Court—for the following very obvious reasons:

(1) Testator Arthur Eddy died in April, 1925.

For more than four and one-half years there was a period of rising stock prices. No effort was made by Respondent Trustee to liquidate the trust estate's holdings of capital stock in several local Saginaw speculative corporations—several of which kept their Company accounts at Trustee Bank.

By the fall of 1929 the Eddy Estate's holdings in these local companies—such as Consolidated Coal Company—had declined in value several hundred thousand dollars—and it was so admitted.

See Trustee's Amended Bill, paragraphs 8 and 9 Record 19, second judgment of February 7, 1939.

(2) *This entire loss* was due almost entirely to local Saginaw conditions peculiar to the particular business of these companies. See testimony of Auditors Walton and Collins—R. 235 to 315 and 335 to 360.

This entire loss could have been entirely made up and recouped—had the Trustee sold the Estate's holdings of the capital stock in the Trustee Bank—which Estate's Bank shares were appraised in 1925 at testator Eddy's death at $300,000. A sale of these Bank shares (converted into Guardian Group Banking Corporation's shares in December, 1929, by Trustee) could have been sold any time in February, March or April, 1930 by the Trustee Bank for $1,000,000. See Exhibit 70, Page 319 of Second Case Record.

(3) This $1,000,000 so realized from a sale of the Estate's Bank shares owned by the Eddy Trust would have—

(a) Paid in full their 1925 appraised value of $300,000 and also

(b) Paid in full the $500,000 or so lost by the Trustee Bank by its failure to sell any of these speculative local corporate stocks in the 1925 to 1930 period of rising stock market prices.

(4) Instead this Trustee Bank kept every share of the so-called Bank Group, Inc. stock it received for the Estate's holdings in the Trustee Bank—and lost the entire $1,000,000 of market value by the March, 1933, Bank Closing Holiday.

Then this Trustee Bank had to pay out $54,000 in Bank stock assessments—

then in 1933—it used $240,000 of the Eddy Estate money to buy back from the Group, Inc. Receiver—the Bank's capital stock—which the Trustee Bank had traded in 1929

for Group, Inc. shares—this purchase was made on the theory that the repurchase of the Bank's entire capital stock was a very good deal—

since then, however, the Trustee Bank has sold most of the Eddy Estate's holdings in the Trustee Bank's repurchased capital stock—although its market price has been constantly increasing—from year to year.

(5) To conclude—Petitioner wishes this Supreme Court to know—that never in this testamentary trustee's accounting suit—did she file any exception to—or object to large admitted losses by this Trustee in the years of 1929 to 1930 sustained by the Eddy Estate in declining (1) bond value, (2) real estate values, (3) accounts receivable, etc.

(6) What Petitioner did consider she had a perfect right to do—was to ask the Trustee Bank to justify the Eddy Estate's losses in these local Saginaw speculative corporate stocks—

not in the depression years of 1931 to 1938—*but* in the rising stock market value years of 1925 to 1929—

This justification, this petitioner, as a defendant in the accounting suit brought by Trustee Bank, had the legal and moral right to, under the rule in Michigan of

Davidson v. Young, 290 Mich. 266.

(7) Petitioner respectfully suggests that it took no "clairvoyance" on the part of any corporate Trustee—to enable it to sell in the Spring of 1930 for $1,000,000 Bank Group shares appraised at $300,000 in 1925—and with the profits to recoup for the *cestui que trusts* the $500,000 of losses suffered in the years of 1925 to 1930 in the speculative local Saginaw Corporations' stocks retained by the Trustee Bank.

(b) In its opinion, the Court of Appeals, said:

> "The appellant initiated the main controversy, she joined in her mother's cross bill, and the lawyers were the same or associated."

(1) Petitioner Cleveland did not join in the cross bill filed by her mother's Administrator asking damages for the fraudulent under-statement of $700,000 in the fair value of her interests sold in 1920 to her brother Arthur Eddy.

See the Administrator's amended answer and cross bill, R. 1, first appeal, Cause No. 8336.

(2) After the administrator had filed on August 30, 1938, his cross bill for damages for this fraudulent understatement of value—the Trustee Bank—on August 30, 1938, filed a motion to strike this cross bill from the files—on the ground that the administrator "has no right, title or interest in" the causes of action, which were vested "in the Mercantile Trust Company of Baltimore, Maryland."

R. 131, Second Appeal, Cause No. 8366.

(3) Thereupon, Petitioner and ner children as heirs at law, asked leave to be parties "if it is necessary" to protect their rights.

(4) Thereafter—the District Court on August 30, 1938, permitted the ancillary administrator Van Auken (previously appointed by the Saginaw Probate Court) to proceed as the duly accredited representative of the mother's Estate—in course of administration in Baltimore.

See R. 228, Second Appeal, Cause No. 8366.

Thus ended any part Petitioner Cleveland ever took in the first fraud action by the Administrator Van Auken—and which was actually and in fact—prosecuted by the Ad-

ministrator, Van Auken, representing the will filed in the Orphans Court in Baltimore.

Nor did appellant Petitioner (in this fraud case) appeal from the adverse judgment of December 13, 1938, dismissing the administrator's cross bill (R. 492).

But Petitioner's children by a guardian ad litem did appeal, since they had an interest under their grandmother's will. Petitioner Cleveland had none.

(c) In its opinion, the Court of Appeals further summarized, as follows:

> "It was against this background of persistent, harassing, and futile litigation that the final account of the trustee came on for hearing before the district judge, * * *
>
> Furthermore, the court found that Mrs. Doebler had received all the income of the trust to which she was entitled."

TO THESE CONCLUSIONS—PETITIONER CLEVELAND RESPECTFULLY URGES FULL CONSIDERATION OF THE FACTS SET FORTH IN APPENDIX A TO THIS BRIEF.

POINT VII

CONCLUSION OF BRIEF

A. An issue whether Petitioner Cleveland is legally chargeable with all Trustee's counsel fees in both cases Nos. 8336 and 8366 should be framed and tried.

Petitioner never had any opportunity to defend herself on this issue—and no witness ever testified she is to be blamed for the mother's Administrator's fraud action.

Not one word of testimony in the entire record bears on this question. There are no pleadings and no proofs to support the entry of the Judgment of November 30, 1943, awarding against Petitioner Cleveland the sum of $39,000 of Respondent Trustee's counsel fees.

B. The Reasons Relied upon for Allowance of the Writ of Certiorari are well founded.

Respectfully submitted,

WILLIAM ALFRED LUCKING,
Attorney for Petitioner, Cynthia Mills Cleveland,
1607 Ford Building,
Detroit 26, Michigan.

CERTIFICATE OF COUNSEL

The undersigned does hereby respectfully certify to this Honorable Court that he has prepared the annexed Petition for Writ of Certiorari and is familiar with the matters and statements and points therein set forth and verily believes the same to be well founded—that this petition is not filed for purposes of delay—and that he is authorized to file the same in behalf of said petitioner.

WILLIAM ALFRED LUCKING

Dated: October 16, 1945.

APPENDIX A

(1) In 1934, Trustee Bank—filed against Petitioner Cleveland, residing in California, and her mother, Mrs. Doebler, residing in Baltimore—a tricky bill of complaint asking that the Ninth Paragraph Trust Corpus under the Eddy will—actually appraised in 1925 at testator's death at $1,400,000—be held to be the mere par value of certain shares of the Eddy Family Holding Company—the par being $41,666. Now the joker was that if the District Court had entered such a judgment—then this Trustee was absolved from liability for negligent loss of all (or up to) the surplus of over $1,300,000.

(2) Upon Petitioner's objection, Trustee filed in March, 1935, an amended bill admitting that

(a) The assets appraised at $1,400,000 behind the par value holding company shares (par value $41,666) were in law the trust estate corpus

(b) Admitting heavy losses—and

(c) Asking exoneration because of the depression (R. 16 *et seq.*).

(3) Thereupon, defendants in said amended bill, Doebler, life tenant, and Cleveland, Residuary Legatee, (under paragraph Ninth of the Eddy Will Trust) filed answers and on April 11, 1936, the District Court entered (prepared by Trustee) an accounting order upon the determination (and admission of all parties) that the $1,400,000 of holding company assets behind the one-third of the small par value shares—were the corpus of the Ninth Paragraph Trust Estate—for which Trustee should account.

R. 16, *et seq.*

(4) Thereupon a lengthy accounting was made and filed by Respondent Trustee covering the first eleven years of the life estate (1925 to 1936).

See R. 235 *et seq.* Exhibits 3, 4 and 5.

(5) These Exhibits and supplements for years 1937 and 1938—showed

(a) An admitted loss by Trustee of about $125,000 in Petitioner's one-sixth residuary estate.

The admitted losses were in corporate stocks, bonds, accounts receivable and real estate.

(6) Petitioner filed exceptions to the Trustee's account *on only the admitted losses in the corporate stocks* (R. 122 to 129)—

nearly all of which losses occurred in the rising (general) market price period of 1925 to 1929 inclusive.

(7) At the final hearing (after the life tenant's (Doebler) death in the spring of 1938) the Trustee attempted to justify the admitted corporate stock losses—by blaming them all on the depression of 1931 to 1934, etc.

The principal witness for the Trustee was R. Perry Shorts, Trustee's President, called by Trustee.

R. 603.

(8) Petitioner and defendant Cleveland—had the moral and legal right to full cross examination—since Trustee had the burden of proof under Michigan Law "to justify admitted losses"—see

Davidson v. Young, 290 Mich. 266.

(9) The auditors found—after all credits were given Trustee for any gains in some stocks and other asset

values—that still Petitioner Cleveland had lost $125,000 from 1925 to 1938, at life tenant's death, such losses being principally in the speculative corporate stocks of local Saginaw Corporations doing business at Trustee Bank—and in the general rising corporate stock market value period of 1925 to 1930. See testimony of Auditor Collins, R. 335 *et seq.*—never questioned by Trustee Bank.

(10) The Auditors appointed by Trustee also found that in the life estate period of 1925 to 1938—an accumulation of $181,000 of income was due Petitioner Cleveland's mother, life tenant Doebler, which had not been distributed by the Trustee (which controlled the family holding corporation, C. K. Eddy and Sons) in the form of annual dividends by the directors elected by Trustee Bank.

R. 311 *et seq.*

(11) With this record before it—the District Court suddenly at the end of the proofs—announced that

(a) The consented to by all parties and fully performed accounting order of April 11, 1936 (R. 117) making the valuable $1,400,000 of assets of the family company (and not the 41,666 par value shares) and trust corpus under paragraph 9 of the Eddy will—

would be set aside—that the corporate entity of C. K. Eddy and Sons (all $125,000 of the par value shares were owned by Testator Eddy at his death in 1925) would be resumed—and therefore that—

(b) Mrs. Doebler, the life tenant, (Doebler's administrator Van Auken) could draw none of her admitted balance of unpaid income of $181,000 — See judgment of February 7, 1939, Par. 9, R. 188.

(c) That Petitioner Cleveland had lost nothing because she still had her one-sixth of the small par value holding company shares $20,866 par value—actual appraised value of assets behind them of $616,000 at testator's death in 1925—and

therefore, she was entitled to no relief in this testamentary final accounting suit commenced in 1934—with the very peculiar bill of complaint to have the Court rule (against non-resident women life tenant and residuary legatee) that the corpus of the Ninth Paragraph Trust was only $41,666 par value of family holding company shares. See bill, prayer (g) R. 5.

(12) And just to make the decision "complete" from the Trustee Bank's viewpoint, the District Court did two other things, namely:

(a) It required Petitioner Cleveland—

because she had dared to ask the Trustee Bank to justify the Trustee's admitted heavy corporate stock losses in the years following the testator's death in 1925, and preceding the depression year of 1931 (as she had the right to do as a defendant—290 Mich. 266)

To pay all the Trustee's counsel fees in the (1) fraud action of administrator Van Auken, involving her mother's sale in 1920, during the testator's life time, at $700,000 of her family holding shares—which the secret set of books found after Mrs. Doebler's death, showed was worth over $1,400,000—and upon which basis the defrauding Arthur Eddy had paid estate taxes to the Government (R. 1013—showing total estate of $4,300,000).

(b) And the District Court's judgment of February 7, 1939 undertook to whitewash the heavy

losses the Charitable Trust (created by paragraph Tenth of Mr. Eddy's will) had suffered—

when the Charitable Trust was not in Court at all to defend itself—

and neither the Attorney General of Michigan nor the Saginaw County Prosecuting Attorney ever were notified of the proceedings—although the Statutes of Michigan provide they shall represent all charitable trusts in all legal proceedings.

See judgment of February 7, 1939, Par. 2, R. 186.

(13) The Court of Appeals affirmed without opinion (117 Fed. (2d) 1009) this District Court Judgment on February 14, 1941—allowing by its mandate the Trustee the usual Appellee's counsel fee of $20.

(14) Petitioner Cleveland asked on rehearing, that at least she be given what remained of her one-sixth of the actual holding company assets—so she would not be left at the mercy of this Trustee Bank—with a minority stock interest of one-sixth of these small par value shares of the family holding company—tied up in a perpetual trust—under the control of this Trustee Bank. See Mr. Eddy's will, Pars. 9 to 12, R. 8 to 15.

(15) This rehearing the Court of Appeals denied—although Petitioner pointed out that the Trustee Bank controlled C. K. Eddy and Sons, had filed answers and pleadings actually asking the dissolution of C. K. Eddy and Sons, and the distribution to Petitioner of the "assets represented by the shares of stock so held under paragraph Ninth of said will be distributed in accordance herewith and as prayed for by said plaintiff Trustee" (R. 157).

DEC 3 1945
CHARLES ELMORE CROPLEY
CLERK

UNITED STATES OF AMERICA

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 539

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,

vs.

SECOND NATIONAL BANK AND TRUST CO. of Saginaw, Michigan, individually and as Trustee under the Ninth and Tenth Paragraphs of the will of Arthur D. Eddy, deceased,
Respondent and Plaintiff Below.

RESPONDENT'S BRIEF
In Opposition to Petition for Writ of Certiorari

WILLIAM C. O'KEEFE,
HUGO E. BRAUN,
Attorneys for Respondent
805 Second Natl. Bank Bldg.,
Saginaw, Michigan

CAPITOL PRINTING CO., LAW PRINTERS, DETROIT, MICH.

SUBJECT INDEX

	Page
Argument	4-13
Findings are substantiated by the testimony	4-8
Petitioner's position reviewed	8-13
(a) The Law of the Case has been determined	8-11
(b) The fees were reasonable	11-13
Conclusion	13
Jurisdiction	2
Opinions of the Courts Below	1
Counter Statement of the Case	2-4

TABLE OF CASES CITED

	Page
American Canning Co. v. Ladoga Canning Co., 44 Fed. (2d) 763	5
Baxter v. Szucs, 248 Mich. 672; 227 N.W. 666	12
Becht v. Miller, 279 Mich. 629; 273 N.W. 294	12
Cleveland v. Second National Bank & Trust Co., 149 Fed. (2d) 466	1
Davidson v. Young, 290 Mich. 266	6, 9
Davis v. Parrington, 281 Fed. 10 at 17	6
Home for Destitute Crippled Children, et al., v. Boomer, et al., 320 Ill. App. 541, 51 N.E. (2d) 830, 834 (syllabus 7-9)	11
Louisville & N. R. Co. v. Dickerson, 191 Fed. 705	6
O'Hara v. Oakland County, et al., 136 Fed. (2d) 152	7
Patterson v. Northern Trust Co., 286 Ill. 564, 122 N.E. 55	6
Reichert v. Metropolitan Trust Co., 266 Mich. 322; 253 N.W. 313	12
Second National Bank & Trust Co. v. Reid, Circuit Judge, 304 Mich. 376	6
Sprague v. Ticonic National Bank, 307 U. S. 161, 59 Sup. Ct. 777	6, 10, 11
Van Auken, et al., v. Second National Bank & Trust Company, 117 Fed. (2d) 938, 313 U. S. 593, 61 Sup. Ct. 1118, 85 L. Ed. 1547	1, 2
Van Auken, Adm'r, et al., v. Second National Bank & Trust Co. of Saginaw, Michigan, as Trustee, et al., 117 Fed. (2d) 1009, 313 U. S. 594, 61 Sup. Ct. 1119, 85 L. Ed. 1547	8
Woodbury v. Andrew Jergens Co., 37 Fed. (2d) 749, 750	12

UNITED STATES OF AMERICA

in the

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 539

CYNTHIA MILLS CLEVELAND,
Petitioner and Defendant Below,

vs.

SECOND NATIONAL BANK AND TRUST CO.
of Saginaw, Michigan, individually and as Trustee
under the Ninth and Tenth Paragraphs of the
will of Arthur D. Eddy, deceased,
Respondent and Plaintiff Below.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari

OPINIONS OF COURTS BELOW

The last opinion in this case was filed May 22, 1945, and is found reported in *Cleveland v. Second National Bank & Trust Co.*, 149 Fed. (2d) 466, and refers to the trustee's fees charged against the petitioner.

The preceding opinion is found in *Van Auken v. Second National Bank & Trust Co.* (C.C.A.), 117 Fed. (2d) 938.

JURISDICTION

The respondent knows of no special and important reasons why a review on writ of certiorari should be granted, as the instant case involves only the amount of the trustee's expenses to be charged against the petitioner, the law of the case having been decided in *Van Auken v. Second National Bank & Trust Co.* (C.C.A.), 117 Fed. (2d) 938, certiorari denied by this court, 313 U. S. 593 (61 Sup. Ct. 1118, 85 L. Ed. 1547).

COUNTER-STATEMENT OF THE CASE

(Figures in parentheses refer to pages of the printed record except as the context clearly indicates otherwise, as in certain references to the pages of briefs filed in the main case.)

This litigation has been heretofore before this court, the Circuit Court of Appeals, Sixth Circuit, and the Michigan Supreme Court.

> "Cross claimants Van Auken and Mrs. Cleveland took an appeal from the judgment disallowing their counterclaim to the United States Circuit Court of Appeals, 6th Circuit, and the judgment of the district court was affirmed. *Van Auken v. Second National Bank & Trust Co.* (C.C.A.), 117 Fed. (2d) 938. Certiorari was denied by the United States Supreme Court, 313 U. S. 593 (61 Sup. Ct. 1118, 85 L. Ed. 1547). Defendants and cross-plaintiffs in the main case also took an appeal to the United States Circuit Court of Appeals, 6th Circuit, and the judgment of the district court was also affirmed, 117 Fed. (2d) 1009. A rehearing was denied. Certiorari to the United States Supreme Court was also denied, 313

U. S. 594 (61 Sup. Ct. 1119, 85 L. Ed. 1547)." *Second Nat'l Bank v. Reid*, 304 Mich. 376 at 386.

The instant litigation is an appeal from the judgment of the District Court dated November 30, 1943 (R. 48), directing the trustee's reimbursement for its expenses in the above litigation in the federal courts.

In its final judgment in the main litigation above referred to, being the judgment rendered in the District Court on February 7, 1939, in Equity Case No. 540 (R. 256-8), the District Court reserved to itself the right to fix and approve expenses of the trustee "as between solicitor and client," and in this connection ordered:

> "8. * * * that the trustee file with this court a report of its disbursements in the above matter, together with statement of accounts of its auditors and counsel, and upon approval thereof by this court, and prior to the turning over of any assets, that the same be paid out of the dividends due on the shares of stock eventually to be turned over to Cynthia Mills Cleveland" * * *.

Pursuant to such judgment, the trustee filed with the District Court reports of its disbursements in the above matter, including statements of accounts of its auditors and counsel, and including the disbursements incurred in the Circuit Court of Appeals and on the application for writ of certiorari in the Supreme Court of the United States.

A hearing was had on the reports and the court in its judgment approving same (R. 48), made a finding of fact that the disbursements were reasonable in amount, that

the disbursements, including fees of auditors and counsel, in the District Court and in the Circuit Court of Appeals for the Sixth Circuit, and upon application for writ of certiorari in the Supreme Court of the United States, were all in the above matter and directly a part thereof. The court then entered the judgment here appealed from (R. 48) approving the trustee's disbursements in the main litigation above referred to, and directed the trustee to pay the same out of the dividends due on the shares of stock eventually to be turned over to petitioner and reimburse the trust therefrom, and concluded the matter by ordering that the expenses of the hearing on the disbursements be paid by the trustee out of the dividends due on the shares of stock eventually to be turned over to petitioner, in the same manner as directed in the final judgment in the main litigation (R. 256-8).

The judgment of the District Court was affirmed by the Circuit Court of Appeals (Sixth Circuit) and petition for rehearing denied. See: 149 Fed. (2d) 466.

ARGUMENT

The Findings are Substantiated by the Testimony

The finding that the disbursements were "all in the above matter," is based on the fact that the final judgment in the main case rendered February 7, 1939 (Equity Case No. 540, District Court), included both the "fraud" and "mismanagement" subdivisions (R. 256-8). Paragraphs 2, 3 and 4 of that judgment concern the "mismanagement" branch of the case (Case No. 8366 C.C.A. Sixth Cir.) (117 Fed. (2d) 1009), and 5, 6 and 7 the so-called "fraud"

branch of the case, which was affirmed by the Circuit Court of Appeals, Sixth Circuit in Case No. 8336 C.C.A. Sixth Cir. (117 Fed. (2d) 938).

The only case in the District Court in which these matters are involved is Equity Case No. 540. The final judgment in that case covered and included both the "fraud" and the "mismanagement" divisions (R. 256-8).

The court was justified in its finding that the expenses in the Circuit Court of Appeals and in the Supreme Court of the United States should be included.

> "* * * Certainly the claim for 'as between solicitor and client' costs was not directly in issue in the original proceedings by Sprague. It was neither before the Circuit Court of Appeals nor before this court. Its disposition, therefore, by the mandate of either court could be implied only if a claim for such costs was necessarily implied in the claim in the original suit, and its failure to ask for such costs an implied waiver. These implications are repelled by the basis on which such costs are granted. *They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal place such a claim in much better perspective than it would have at an earlier stage.* * * * *Sprague v. Ticonic National Bank*, 307 U. S. 161 at 168; 59 Sup. Ct. Rep. 777 at 781. (Italics ours.)

American Canning Co. v. Ladoga Canning Co., 44 Fed. (2d) 763 at 771 and 772:

"The statute authorizing plaintiff's recovery of reasonable attorneys' fees directs their inclusion as

> a part of the costs. We find nothing in this statute which limits this allowance to services rendered in the District Court. Its terms are broad enough to include plaintiff's reasonable attorneys' fees necessarily incurred in any court wherein the cause was pending. A similar construction has been placed on a similar statute. *Davis v. Parrington* (C.C.A.) 281 F. 10, 17; *Louisville & N. R. Co. v. Dickerson* (C.C.A.) 191 F. 705, 712."

See *Patterson v. Northern Trust Company,* 286 Ill. 564, 122 N.E. 55.

Testimony of all the witnesses is that the charges were reasonable in amount for the work done (R. 130, 138, 142, 149, 174, 178).

The conclusiveness of the Federal Court adjudication was determined in the Michigan courts between the parties in the case of *Second National Bank & Trust Company of Saginaw v. Reid,* 304 Mich. 376, the court saying, at 396:

> "(9) Mrs. Cleveland further claims that the large sums she would be charged with for costs and expenses are wholly illegal and improper; that under *Davidson v. Young,* 290 Mich. 266, the trustee had the burden of providing the correctness of his account. The court in its findings held that the trustee had met this burden. The first suit was removed to the Federal Court by Mrs. Cleveland and she is bound by the judgment. In *Sprague v. Ticonic National Bank,* 307 U. S. 161 (59 Sup. Ct. 777, 83 L. Ed. 1184), the United States Supreme Court approved of the 'reimbursement for the costs of litigation other than the conventional taxable costs.' The judgments of the Federal Court are final and the parties are bound thereby."

A case very similar to the instant one was decided by the Circuit Court of Appeals (6th Cir.), in *O'Hara v. Oakland County, et al.*, 136 Federal (2d) 152, in which case the appellant O'Hara filed a petition in the District Court, in which he set forth that during the progress of the litigation, which had continued for nine years, he had represented certain parties, that almost the entire responsibility for the conduct of the litigation fell upon him, that he arranged for the testimony of practically all the expert and other witnesses, conducted the examination of said witnesses and cross-examination of witnesses and:

> "In addition to conducting the trial, Mr. O'Hara filed elaborate briefs and undertook the main argument for defendants, both before the Master and the District Court. He (with his associates in his firm) did practically all the work for defendants in preparing the 448-page record on appeal and wrote the great bulk of the brief of more than one hundred printed pages filed with the Court of Appeals. He handled the oral argument for the defendants before the Circuit Court of Appeals, and wrote and filed briefs in connection with a petition for rehearing filed by the bondholders, and also in connection with the petition for certiorari and rehearing thereon before the United States Supreme Court. In addition he participated in the collateral case already mentioned of *Highland Park v. Clark* (300 Mich. 501). * * *
>
> "The Master recommended an allowance to petitioner for his services of a fee of $30,000 to be paid out of the fund."

The court confirmed the special Master's report and the decree allowing the fee of $30,000 to be paid out of the fund of $133,030.56, and cited the cases of *Sprague v.*

Ticonic Bank, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184; *Trustees v. Greenough,* 105 U. S. 527, 26 L. Ed. 1157; *Wallace v. Fiske,* 8 Cir., 80 F. 2d. 897, 903.

From a reading of the case, the facts are almost similar. The amount allowed is substantially the same, and in the instant case the amount preserved was around Three Million Dollars, instead of One Hundred Thirty-three Thousand Dollars.

PETITIONER'S POSITION REVIEWED

(a) The Law of the Case has been Determined

Van Auken v. Second National Bank & Trust Co., 117 Fed. (2d) 1009; Certiorari denied, 313 U. S. 594.

Petitioner claims the District Court was in error in applying Section 8 of the judgment rendered by him in Equity Case No. 540 on February 7, 1939 (R. 256-8), to the accounts and facts disclosed by the testimony in this proceeding. It is a little late for that, as the judgment was affirmed by the Circuit Court of Appeals, Sixth Circuit and Certiorari denied by this court. The question of paragraph eight's validity was raised in the briefs, as we point out below (Sec. 2 hereof).

(1) Petitioner claimed (R. 60, 61) that the final judgment (R. 256-8) did not cover the "fraud" case (No. 8336), and hence the disbursements in connection with the "fraud" case were not a part of the report of the trustee's disbursements. Petitioner is mistaken in that respect, as paragraphs 5, 6 and 7 (R. 257) cover the cross-bill and counterclaim filed by Howell Van Auken, as ancillary ad-

ministrator, wherein fraud was charged against Arthur Eddy and Walter Eddy, and the District Court in said final judgment (R. 256-8) dismissed said cross-bill and counterclaim, also the cross-bills and counterclaims filed by Dean Lucking, as guardian, and the cross-bills and counterclaims filed by Cynthia Mills Cleveland as co-counterclaimant, all arising out of the same claimed fraud on the part of her two uncles, Arthur and Walter Eddy.

Petitioner further claims (R. 54, 91, 96, 131, 138), that the case of *Davidson v. Young,* 290 Mich. 266, sets up the correct rule which the Federal court should follow. The same claim was made before the Circuit Court of Appeals, Sixth Circuit, prior to the affirmance of the original case, in petitioner's first main brief on the merits (Plaintiff's Exhibit No. 1110), at page 77, paragraph 4, wherein the case of *Davidson, Trustee, v. Young,* Michigan Supreme Court Advance Sheets, September 6, 1939, was cited, and on page 78 the entire page was occupied with a quotation therefrom.

In petitioner's petition for re-hearing in the Circuit Court of Appeals, Sixth Circuit, in the original case, being case No. 8366 (Plaintiff's Exhibit No. 1113), at page 3, in the center of the page, *Davidson, Trustee, v. Young,* 290 Mich., 266, is cited as authority.

The judgment of the District Court affirmed by the Circuit Court of Appeals, Sixth Circuit, was held conclusive by the Supreme Court of the State of Michigan, supra, citing *Davidson v. Young,* 290 Mich. 266, and writ of prohibition to stop further litigation in the Michigan courts was issued.

(2) Petitioner further claims that Mrs. Cleveland is not and should not be held liable for any counsel fees included in the trustee's expenses (R. 51, 52, 53). The law has been determined to the contrary by the District Court, the Circuit Court of Appeals, and Certiorari denied by this court.

In case No. 8366 before the Circuit Court of Appeals, Sixth Circuit, in appellants Van Auken and Cleveland's reply brief (Plaintiff's Exhibit No. 1109), appellant devoted page 103, Section XIV, pages 104 and 105 and a portion of page 106, to a discussion of this question, and cited *Sprague v. Ticonic National Bank*, 307 U. S. 161, along with other cases, and discussed the same.

In the brief for Second National Bank & Trust Company of Saginaw, Michigan, as trustees, etc., plaintiff and appellee (Plaintiff's Exhibit No. 1103), in case No. 8366, at page 62, the question of the payment of the trustee's expenses was discussed, and *Sprague v. Ticonic National Bank* cited and discussed, and the discussion continues to the middle of page 66.

In respondent's brief in opposition to petition for writ of certiorari in the Supreme Court of the United States, No. 1054 (Plaintiff's Exhibit 1116), at pages 35 and 36, the payment of the trustee's expenses is discussed, and *Sprague v. Ticonic National Bank* is cited and discussed.

In petitioner's motion for leave to file additional reasons relied on for allowance of writ of certiorari in the Supreme Court of the United States (Plaintiff's Exhibit 1114), at page 12, counsel for petitioners state that they had not been advised of the court's decision of *Sprague v. Ticonic*

National Bank, 307 U. S. 160 (although it had been previously discussed in their own briefs).

After a thorough discussion of the legality of that part of the judgment relating to the trustee's disbursements, in the Circuit Court of Appeals, and the citation of the case of *Sprague v. Ticonic National Bank, supra*, the Circuit Court of Appeals, Sixth Circuit, affirmed the judgment of the United States District Court (117 Fed. (2d) 1009), and after a like discussion of the case in this court and the citation of the Ticonic National Bank case, petition for writ of certiorari was denied and the judgment of the District Court thus affirmed. The law of the case was thus settled.

Then, in the state courts of Michigan, its validity was attacked. The Supreme Court of this state held that it was a valid judgment, and issued writ of prohibition to prevent further unnecessary litigation. *Second National Bank v. Reid, supra.*

(b) The Fees Were Reasonable

The only question then left in this case was the reasonableness of the trustee's disbursements. The proof disclosed that the witnesses on both sides thought they were reasonable (R. 130, 138, 142, 149, 174, 178), and, on the part of the appellee (R. 130, 138, 142, 149), that they were extremely low. See *Home, etc., v. Boomer*, 320 Ill. App. 541; 51 N.E. (2d) 830, 834 (Syllabus 7-9).

Petitioner claims the fees of the attorney should be determined on a per diem basis. Such is not the law.

"Value of attorney's services must be based upon a number of considerations, including the professional reputation and standing of the attorney, the difficulty and importance of the case and the amount of time spent and work performed, the sum involved, the result of the litigation.

Baxter v. Szucs, 248 Mich. 672; 227 N.W. 666;

Becht v. Miller, 279 Mich. 629; 273 N.W. 294;

Reichert v. Metropolitan Trust Co., 266 Mich. 322; 253 N.W. 313.

Time or labor alone is not sufficient in measuring the value for lawyer's services.

Woodbury v. Andrew Jergens Co., 37 Fed. (2d) 749, 750.

CONCLUSION

The law in this case has been determined by the Circuit Court of Appeals, Sixth Circuit, and this court has denied writ of certiorari. The trustee has submitted its disbursements and they have been found reasonable by the District Court, upon the uncontradicted testimony. The District Court has found as a fact that the disbursements were all in the above matter, viz.: Case No. 540 in Equity; that the "fraud" division and the "mismanagement" division were included in the final judgment of February 7, 1939 (R. 256), which ordered the reimbursement (Par. 8). The Circuit Court of Appeals affirmed the judgment (149 Fed. (2d) 466). The opinion by Judge Simons, found at page 266 of the record, which covers the entire litigation, affirms the judgment of the District Court and characterizes the litigation as "persistent, harassing and futile."

That should dispose of the matter.

Respectfully submitted,

WILLIAM C. O'KEEFE,
HUGO E. BRAUN,
Attorneys for Respondent.